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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 594

PHILIP RASTELLI,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

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Member of the Bar of
The United States Supreme Court
Of Counsel

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In the

Supreme Court of the United States

October Term, 1970

No. .....

Philip Rastelli,

Petitioner,

—against—

The People of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Division, entered in the above entitled case on June 15, 1970.

A. Opinions Below

There were no opinions rendered by any of the Courts of the State of New York in connection with the proceedings in this case.

B. The Grounds Upon Which the Jurisdiction of This Court Is Invoked

Jurisdiction in this Court is invoked under Title 28, U.S. Code §1257(3) and Rule 19, Subdivision 1 of the rules of this Court.

The judgment sought to be reviewed herein is the judgment of the Appellate Division, Second Judicial Department made on June 15, 1970 as aforesaid, and annexed hereto as Appendix A.

C. Questions Presented for Review

1. Does it violate due process of law or the privilege against self-incrimination for a Grand Jury in one county to subpoena a witness who has already been punished for refusal to answer questions before a Grand Jury in another county and propound the same questions to him for which he had already been punished and, to then punish him again when he refuses to answer the same questions for which the other Grand Jury had punished him?

2. Does it violate the constitutional right the assistance of counsel to deny a witness whose presence before a Grand Jury is compelled by subpoena the right to have his counsel physically present with him in the Grand Jury room in order to protect his legal rights when he is being interrogated therein?

D. Constitutional Provisions and Statutes Involved

The constitutional provisions involved herein are those portions of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution relating respectively to

the privilege against self-incrimination, to the right to the assistance of counsel and to due process of law.

The statute involved is Section 750 of The New York Judiciary Law dealing with punishment for contempt of Court in refusing to answer lawful interrogatories.

Pertinent parts of each of the foregoing are set forth verbatim in this petition as Appendices C, D, E and F respectively.

E. A Concise Statement of the Case and Material Facts Pertaining to the Consideration of the Questions Presented

The petitioner, PHILIP RASTELLI, had been subpoenaed to appear before the Grand Jury in Kings County to give testimony. Pursuant to that subpoena, petitioner appeared and the matter was adjourned on several occasions. The purpose of the adjournments was to allow him to retain counsel. The petitioner, having obtained counsel, appeared pursuant to said subpoena and was informed that he had been given immunity from prosecution by the Grand Jury.

Thereupon, various questions were put to the witness. He was asked if he knew individuals by the name of Carlo Gambino, Paul Sciacca, Natale Evola, Jimmy Failla also known as Jimmy Brown, Joseph Columbo and Frank Mari. To each of those questions he stated that he declined to answer those questions on the ground that to answer would tend to incriminate him.

He was also asked the source of loans which he had previously stated he had received. He refused to answer that question upon the same ground.

He was thereupon excused and thereafter a motion was made returnable in the Supreme Court of Kings County to punish him for contempt under §750 of the Judiciary Law of the State of New York by reason of the foregoing refusal to answer.

An answering affidavit was interposed by him in opposition to that motion. Said answering affidavit is appended to this petition as Appendix G. In opposing said motion to punish him for contempt, the petitioner stated:

> "The purpose and motive in offering me this immunity was in effect to provide a basis for the District Attorney to punish me either for contempt or for perjury when in fact he had no evidence of my committing any substantive crime. I, therefore, would request the privilege of being returned to the Grand Jury with my counsel present in the Grand Jury at the time that I am being called upon to testify in the same way that I would be entitled to have my counsel present when I am being questioned in connection with any substantive crime."

Petitioner further pointed out in said affidavit that at the same time that he was under subpoena to appear before that Grand Jury in Kings County, he was also subpoenaed by a Grand Jury in Nassau County. The stated purpose of the Nassau County Grand Jury was to investigate various crimes in connection with an inquiry into the alleged take-over of an organized crime syndicate. This was the same purpose for which the Kings County Grand Jury had subpoenaed him.

Petitioner further pointed out that he had appeared before the Grand Jury in Nassau County and, asserting

his Fifth Amendment privilege, had refused to answer questions on January 16, 1970 and had been adjudged in contempt of Court by reason thereof. He was sentenced to serve a term of Thirty (30) days imprisonment in Nassau County which term he had in fact served.

Petitioner further pointed out that the same questions which resulted in his punishment for contempt in Nassau County were the very questions which were again being asked of him before the Kings County Grand Jury. It was the contention of the petitioner that the Grand Jury was not asking the questions of him in good faith in promoting their own inquiry, but, rather, that the District Attorney was propounding such questions knowing full well that he had refused to answer those questions in Nassau County and that his being subpoenaed was essentially a device to further commit him for contenrpt, knowing that the witness would again assert his Fifth Amendment privilege and refuse to answer.

More particularly, the petitioner deposed in said affidavit as follows:

> "As a further demonstration of the lack of good faith on the part of the Grand Jury and as illustration of another basis for the denial of this motion, profitable recourse must be had to the questions actually put to me before the respective Grand Juries. For ease of reference I will set forth photostatic copies of the actual pages of the questions before the respective Grand Juries. I will refer to the questions before the Brooklyn Grand Jury by the letter of the alphabet and the identical questions before the Nassau Grand Jury by number. In Brooklyn on the February 5, 1970

appearance I was asked on Page 55, 'Do you know an individual by the name of Paul Sciacca?', (see Exhibit "A"). In Nassau County I was asked, 'Do you know Paul Sciacca, also known as Paulie Shocks?', (see Exhibit "1"). In Brooklyn I was asked, 'Do you know Natale Evola?', (see Exhibit "A"). In Nassau I was asked, 'Do you know Natale Evola?', (see Exhibit "2"). In Brooklyn I was asked, 'Do you know an individual by the name of Frank Mari?', (see Exhibit "B"). In Nassau I was asked, 'Do you know Frank Mari?', (see Exhibit "3"). In Brooklyn I was asked from whom I received the loans of money, (see Exhibits "C" and "D"). In Nassau I was asked to fill out a financial questionnaire concerning my sources of money; (see Exhibit "4").

In short, the questioning was identical and the purpose is manifest. This is borne out by the paucity of the questions actually asked of me in Kings County. The few questions asked me in Brooklyn clearly indicate that information was not being sought in furtherance of an investigation, but merely a quick basis for once again adjudicating me in contempt."

By reason of the foregoing, petitioner prayed that the motion to punish him for contempt be denied or in the alternative, that a hearing be ordered to determine whether in fact the investigation in Kings County and the contempt proceedings based thereon, were instituted in good faith or designed to harass petitioner and punish him for asserting his Fifth Amendment privilege.

The Court rejected petitioner's arguments and adjudged petitioner in contempt and sentenced him to a term of

Thirty (30) days imprisonment and a fine of $250.00. A copy of the Order adjudging petitioner in contempt is annexed hereto as Appendix B.

No hearing was ordered by the Court as requested nor was petitioner permitted to return to the Grand Jury along with his counsel to be physically present therein while he was questioned.

There was submitted to the Courts below, along with the opposing papers, copies of petitioner's Grand Jury testimony before the Grand Juries in Kings County and in Nassau County which demonstrated the identical nature of the questioning by both Grand Juries in both counties.

An appeal was taken to the Appellate Division of the Supreme Court of the State of New York Second Judicial Department. Pending the determination of that appeal that Court stayed execution of the order below adjudging petitioner in contempt and imposing the aforesaid jail sentence and money fine.

Thereafter, on June 15, 1970, the contempt adjudication was affirmed without opinion by the Appellate Division.

Thereafter, an application was made to the Court of Appeals of the State of New York for leave to appeal to that Court. That application was denied on July 6, 1970. An application for a stay of the commitment order pending the filing of the petition for certiorari was denied by the New York Court of Appeals.

Thereafter, an application for a further stay of the commitment order was timely made to the Hon. John M. Harlan, an Associate Justice of this Court. On July 29, 1970 Mr. Justice Harlan granted such a stay upon condition

that this petition be filed in this Court on or before August 26, 1970. Mr. Justice Harlan endorsed on the application the following:

> "In light of the pendency for argument next term of No. 97, *Piccirillo v. New York*, I am constrained to grant a stay, conditioned however as provided in the order I am signing today. JMH 7/29/70"

F. The Stages of the Proceedings in Which the Issues Involved Were Raised and the Manner in Which They Were Raised

The constitutional issues presented herein, namely whether it violated due process of law and the privilege of self-incrimination to punish petitioner for contempt of Court in refusing to answer before a Kings County Grand Jury the same question which he had refused to answer before the Nassau County Grand Jury and for which he had already been punished by a Thirty (30) day jail sentence which he had served, and whether it violated petitioner's constitutional right to counsel by refusing to permit his attorney to be physically present in the Grand Jury room during petitioner's interrogation by the Grand Jury were raised at the earliest procedurally possible stage of the proceedings. Specifically, said issues were raised in the aforementioned affidavit in opposition to the District Attorney's motion to punish petitioner for contempt of Court by reason of his failure to answer the questions propounded before the Grand Jury.

G. Argument Amplifying the Reasons Relied on for Allowance of the Writ

POINT ONE

It was a violation of due process of law and petitioner's Fifth Amendment privilege to punish him for contempt in refusing to answer before a Kings County Grand Jury the same questions which he had already refused to answer before a Nassau County Grand Jury and for which he had already been punished by a jail sentence by reason of such refusal.

As indicated in the statement of the case *supra*, petitioner had been simultaneously subpoenaed to appear before two Grand Juries in near-neighboring counties, to wit, Kings County and Nassau County. The stated purposes of both Grand Juries was to inquire into an alleged conspiracy to take over an organized crime syndicate and related crimes.

Annexed hereto are the minutes of petitioner's testimony before the Nassau County Grand Jury (Appendix H) and the minutes of petitioner's testimony before the Kings County Grand Jury (Appendix I). An examination of the minutes demonstrates the identical nature of the questions posed by both Grand Juries.

As also indicated previously, the refusal to answer the questions before the Nassau County Grand Jury resulted in petitioner's incarceration under a Thirty (30) day sentence for contempt of Court. Petitioner's refusal to answer the same questions before the Kings County Grand Jury also resulted in a Thirty (30) days sentence (the

maximum sentence permitted), which latter sentence is the subject matter of this petition.

We recognize the right of the Grand Jury in respective counties to investigate crime in those counties. However, it is interesting to note in the instant case that the paucity of questions posed to this petitioner before the Kings County Grand Jury clearly indicate that the purpose could not have been investigation. This is further borne out by the fact that these identical questions had been posed to this witness before the Grand Jury in Nassau and he declined to answer them and was punished accordingly. It defies credulity to believe that the Nassau County District Attorneys Office and the Kings County District Attorneys Office would not be in communication and that the Kings County District Attorney would not be privy to the questions and to the witness' response.

It is respectfully submitted that the situation at bar was the situation anticipated by the New York Court of Appeals in the matter of the *Second Additional Grand Jury of the County of Kings* v. *Aurelius Cirillo*, 12 N.Y. 2d 206, 237 N.Y.S.2d 709. This is borne out by the language contained on page 211:

> "Of course, contempt adjudications based on the same refusals or evasions can be so numerous or onerous as to deny due process to the person questioned. Solution of that problem must await an appeal presenting the particular issue."

Our contention at bar is that the procedure of calling this petitioner in Kings County in such close proximity to his punishment in Nassau and asking him the same questions is a denial of his right to due process of law. Certainly, the

brevity and the repetitious nature of the questions clearly indicates that the true purpose was to punish him once again for his correctly anticipated assertion of his Fifth Amendment privileges.

It should also be noted in passing that the questions posed to him by the Kings County Grand Jury were not limited to activities in Kings County, but were merely restatements of the questions posed in Nassau County. It is respectfully submitted that the situation at bar is not dissimilar from the situation in *People* v. *Riela*, 7 N.Y.2d 571, 200 N.Y.S.2d 43. It is suggested that if this procedure is permitted to continue, that theoretically this petitioner can be repeatedly incarcerated by the Grand Juries of the respective neighboring counties by calling him, asking him the identical questions to which they know he will assert his Fifth Amendment privilege and then seeking to repeatedly punish him for thirty (30) days at a time. There is nothing to indicate that after he had been punished in the various metropolitan and adjoining counties the procedure could not be repeated and repeated resulting in continued incarceration in every county in the State of New York.

In short, what we are contending is that in the language of *Cirillo, supra,* the contempt adjudications are so numerous and onerous as to deny this witness Philip Rastelli due process.

To put the proposition another way, in the language of the *Riela* case, *supra,* the only limitation to be meted out to the witness herein is limited to the extent of the cooperation between the various District Attorneys' Offices. There is language contained in *People* v. *Riela, supra,* at page 577, which although involving a somewhat different fact pattern

is applicable at bar. This language was taken from the case of *Yates* v. *U. S.*, 355 U.S. 66:

> ". . . the prosecution cannot multiply contempts by repeated questioning on the same subject of inquiry within which a recalcitrant witness already has refused answers."

This principle is applicable at bar for all that is changed is that another District Attorney's Office within close proximity, both geographically and in time, has repeated the same questions in knowing anticipation of the petitioner's assertion of his Fifth Amendment privilege and is seeking to punish the witness therefor.

The net effect of this complained of conduct raises a serious question of the good faith of the various prosecutors in connection with this witness and should at least have given rise to the requested hearing to determine the true purpose and bona fide nature, if any, of the Kings County Grand Jury proceeding.

POINT TWO

It was a deprivation of petitioner's constitutional right to the assistance of counsel to refuse petitioner's request to have his counsel physically present with him in the Grand Jury Room during his interrogation by the Grand Jury.

The constitutional right to the assistance of counsel has been greatly enlarged in recent years. More significantly, this Court has upheld the right to counsel in various critical situations apart from an actual trial (*Hamilton* v. *Alabama*, 368 U.S. 52 (1961); *U. S.* v. *Wade*, 388 U.S. 218 (1967); *Mempa* v. *Rhay*, 389 U.S. 128 (1968); *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964)).

See also, Meshbesher, *Right of Counsel Before Grand Jury*, 41 F.R.D. 189.

The basic reason for denial by State Courts of the right to counsel inside the Grand Jury Room is the desire to preserve the secrecy of the proceedings. More specifically, this desire for secrecy is generally sought to be bolstered by corollary propositions:

1. To prevent escape by prospective defendants.
2. To prevent prospective defendants or others from seeking to importune grand jurors.
3. To prevent tampering with witnesses.
4. To encourage witnesses to testify uninhibitedly without fear of disclosure.
5. To protect the prospective defendant from disclosure to others of the existence of an investigation directed toward him.

See, *U. S.* v. *Procter and Gamble Co.*, 356 U.S. 677, 681 n. 6 (1958); *U. S.* v. *Rose*, 215 F.2d 617, 628-629 (3 Cir., 1954).

None of these reasons would be applicable to the case at bar. The first three reasons are predicated upon the assumption that the prospective defendant is unaware of the Grand Jury proceedings. Such reasons are hardly supportable where, as here, the petitioner was brought before the Grand Jury under compulsion of subpoena by the prosecutor himself.

The fourth reason relates to keeping secret the identity and testimony of witnesses other than the petitioner. Such secrecy would be unaffected by the appearance of the petitioner.

The fifth reason contemplates improper disclosure of the proceedings by members of the Grand Jury or the prosecutor or other persons apart from the petitioner. New York Law does not prohibit a witness before a Grand Jury from disclosing the fact that he testified or the testimony given by him (*People* v. *Minet*, 296 N.Y. 315).

Thus, once a witness is brought before a Grand Jury, all of the reasons underlying the need for secrecy necessarily become meaningless *as to him*.

If we are correct in that aspect, it would also follow that the physical presence of his counsel in the Grand Jury Room simultaneously with him would in no way prejudice the secrecy requirements. What is known to the witness must be made known to his counsel. This would be particularly true where, as in this case, the witness' presence was secured by the compulsory force of a subpoena.

The right to the physical presence of counsel in the Grand Jury Room does not appear to have been directly considered by this Court. But see, *In re Groban*, 352 U.S. 330 (1957) and *Anonymous* v. *Baker*, 360 U.S. 287 (1959).

In *In re Groban*, this Court held valid an Ohio statute authorizing a Fire Marshal's right to exclude counsel's presence when questioning a witness at an investigatory proceeding to determine the cause of a fire. Analogy was drawn between the right to counsel before a Grand Jury and before "other investigatory bodies" (*id.* at p. 333). The Court noted that the right to counsel was not constitutionally mandated in either situation.

In *Anonymous* v. *Baker*, this Court, drawing the same analogy, held that a Court-ordered secret inquiry into unethical practices by attorneys did not constitutionally mandate a witness' right to have counsel present when being interrogated.

As indicated, *Baker* and *Groban* did not directly reach the issue raised herein. Nonetheless, while the language of those cases would appear to militate against petitioner's position herein, it might also be respectfully noted that they precede in point of time the entire series of Sixth Amendment opinions promulgated by this Court during the past decade.

We, therefore, respectfully urge that the issue herein raised squarely for the first time be considered by this Court.

CONCLUSION

The writ of certiorari herein prayed for should be granted.

Respectfully submitted,

EVSEROFF, NEWMAN & SONENSHINE
Attorneys for Petitioner

WILLIAM SONENSHINE, Esq.
Of Counsel

APPENDIX A

Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department Affirming Order Below

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 15, 1970.

HON. SAMUEL RABIN,
Acting Presiding Justice,

HON. JAMES D. HOPKINS,
HON. FRED J. MUNDER,
HON. M. HENRY MARTUSCELLO,
HON. ARTHUR D. BRENNAN,
Associate Justices.

In the Matter of

EUGENE GOLD, District Attorney of the County of Kings,

Respondent,

—v.—

PHILIP RASTELLI,

Appellant.

ORDER ON APPEAL FROM ORDER

In the above entitled cause, the above named Philip Rastelli, a party, having appealed to this court from an order of the Supreme Court Kings County, dated April 30, 1970; and the said appeal having been argued by William Sonenshine, Esq., of counsel for the appellant, and submitted by Irving P. Seidman and David H. Katz, Esqs., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

Ordered that the order appealed from is hereby unanimously affirmed, without costs.

Enter:

Herman M. Pogul
Clerk of the Appellate Division

APPENDIX B

Order of the Supreme Court of the State of New York, County of Kings, Adjudging Petitioner in Contempt of Court

At a Criminal Term, Part I of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof, Civic Center, Borough of Brooklyn, City of New York, on the 30th day of April, 1970.

Present:

HON. JULIUS HELFAND,

Justice.

In the Matter of the Application

of

EUGENE GOLD, DISTRICT ATTORNEY OF THE COUNTY OF KINGS, FOR AN ORDER DIRECTING

PHILIP RASTELLI

A WITNESS BEFORE A KINGS COUNTY GRAND JURY TO RETURN TO THE GRAND JURY AND ANSWER PROPER AND LEGAL INTERROGATORIES OR IN THE EVENT THE WITNESS SHOULD REFUSE TO OBEY SAID DIRECTION PUNISHING THE WITNESS FOR A CRIMINAL CONTEMPT FOR A WILFUL, CONTUMACIOUS AND UNLAWFUL REFUSAL TO OBEY A DIRECTION OF THIS COURT TO RETURN TO SAID GRAND JURY AND ANSWER PROPER AND LEGAL INTERROGATORIES

It appearing to the satisfaction of this Court that at the May 1968 Term of this Court, Part I thereof, a 4th additional Grand Jury for the County of Kings and for the Court was duly impaneled, and that the said Term of the Court and of the said Grand Jury has been duly extended to May 29, 1970, and that the said Grand Jury was and is now duly in existence;

And it further appearing to the satisfaction of this Court that the said Grand Jury was and is lawfully in session and was and is investigating to determine whether there existed in the County of Kings a criminal conspiracy, to commit the crime of murder, and other related crimes in an effort to succeed one Joseph Bonanno as head of an organized crime syndicate in Kings County.

And it further appearing to the satisfaction of this Court that the Police Department of the City of New York and the District Attorney of Kings County, have obtained information which alleges and indicates that the crime of conspiracy to commit murder, and other related crimes have been committed in Kings County as part of an internecine struggle to succeed Joseph Bonanno as head of an organized crime syndicate in Kings County;

And it further appearing to the satisfaction of this Court that the witness above named, duly appeared as a witness before the Grand Jury and said investigation on the 5th day of February, 1970 and said witness was thereupon duly sworn to tell the truth;

And it further appearing to the satisfaction of the Court that the said witness had refused to answer any questions put to him before the said Grand Jury upon the ground that his answer might incriminate him;

And it further appearing to the satisfaction of this Court that thereupon in the form and manner provided by law, immunity from the prosecution was duly conferred upon the witness;

And it further appearing to the satisfaction of this Court that thereafter on the 5th day of February, 1970, the said witness returned to the said Grand Jury room and was informed that he had been granted full and complete immunity pursuant to law; that questions were propounded to the said witness, which said questions were pertinent, relevant and material to the said investigation then and there being conducted before the said Grand Jury; a copy of the proceedings before the Grand Jury on February 5, 1970, containing the questions propounded to the witness and his answers thereto being set forth herein as Exhibit "A";*

And it further appearing to the satisfaction of this Court that the said witness refused to answer said questions or any other pertinent, relevant and material questions upon the ground that the answer might tend to incriminate him despite the fact that immunity had been duly conferred upon the said witness as hereinabove recited;

And it further appearing to the satisfaction of this Court that thereupon on the 27th day of April 1970, at the request of the said Grand Jury, the District Attorney applied to this Court at Part 1 thereof before the undersigned for a direction and order overruling the objection of the said witness and for a direction and order that the grant of immunity to the said witness was coextensive with

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* Reference is to Grand Jury Proceedings of February 5, 1970. Same are annexed to this petition as Appendix I.

his privilege against self-incrimination with respect to any and all crimes, transactions, matter or things his testimony may disclose before the said Grand Jury, and that his refusal to answer said questions based upon said privilege against self-incrimination was unwarranted in law, and to further direct and order the said witness to return to the Grand Jury and answer the said questions before the Grand Jury.

Upon such application the witness appeared before the Court in person and by his attorney, and the District Attorney of Kings County and said Grand Jury appeared by DAVID H. KATZ, Assistant District Attorney. After hearing the said attorneys in support of their respective positions, the Court on the 30th day of April, 1970, after due deliberation overruled the claim of privilege against self-incrimination of the said witness, and the COURT, thereupon, in open Court, directed and ordered the said witness to return to the said Grand Jury to answer the said pertinent, relevant and material questions. The said witness thereupon in open court, did wilfully disobey the Court's lawful mandate to return to the Grand Jury and answer the pertinent, relevant and material questions.

NOW, on motion of EUGENE GOLD, District Attorney of Kings County, it is ordered and adjudged that the said witness, PHILIP RASTELLI by reason of the particular circumstances of his offense hereinabove set forth for his contumacious and unlawful refusal after being sworn as a witness to answer any legal and proper interrogatories and for his wilful disobedience to the lawful mandate of this Court to return to Grand Jury and testify committed a criminal contempt of Court in the immediate view and presence of the Court and that said contempt was wilful

and unlawful and in violation of Section 750 of the Judiciary Law of the State of New York;

And it is further ordered and adjudged that for the said criminal contempt of court, the said PHILIP RASTELLI be imprisoned in the Civil Prison of the City of New York for a term of thirty days and in addition thereto to pay a fine of $250.00 and in the event that the said PHILIP RASTELLI shall fail to pay the fine of $250.00 herein assessed against him, that he shall be imprisoned for an additional term of thirty days.

And it is further ordered that the Sheriff of the City of New York or his duly authorized agent is authorized and directed at any time upon written request of the District Attorney of Kings County, to deliver the said witness to a police officer of the City of New York for the purpose of taking him to court or to the office of the said District Attorney or to any other place designated by the District Attorney and thereafter returning the said witness to the said Civil Jail.

And it is further ordered and adjudged that the Sheriff of the City of New York or his duly authorized agent, execute this commitment order and imprison the said PHILIP RASTELLI pursuant to this order of commitment. (See Minutes of 4/30/70.)

Enter:

JULIUS HELFAND,
J.S.C.

Dated: Brooklyn, New York
April 30, 1970

Granted: April 30, 1970
ANTHONY N. DURSO

APPENDIX C

U.S. Constitution, Amendment V:

"No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

APPENDIX D

U.S. Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

APPENDIX E

U.S. Constitution, Amendment XIV:

"Section 1 * * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

APPENDIX F

New York Judiciary Law, Section 750

"A. A court of record has power to punish for criminal contempt, a person guilty of any of the following acts, and no others:

"* * * 5. Contumacious and unlawful refusal to be sworn as a witness, or after being sworn, to answer any legal and proper interrogatory."

APPENDIX G

Affidavit in Opposition to Motion to Punish for Contempt

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF KINGS

In the Matter of the Application

of

EUGENE GOLD, DISTRICT ATTORNEY OF THE COUNTY OF KINGS, FOR AN ORDER DIRECTING

PHILIP RASTELLI

A WITNESS BEFORE A KINGS COUNTY GRAND JURY TO RETURN TO THE GRAND JURY AND ANSWER PROPER AND LEGAL INTERROGATORIES OR IN THE EVENT THE WITNESS SHOULD REFUSE TO OBEY SAID DIRECTION PUNISHING THE WITNESS FOR A CRIMINAL CONTEMPT FOR A WILFUL, CONTUMACIOUS AND UNLAWFUL REFUSAL TO OBEY A DIRECTION OF THIS COURT TO RETURN TO SAID GRAND JURY AND ANSWER PROPER AND LEGAL INTERROGATORIES

STATE OF NEW YORK,
COUNTY OF KINGS, *ss.*:

PHILIP RASTELLI, being duly sworn, deposes and says:

I am the witness above named. I make this affidavit in opposition to the motion made by the District Attorney of

Kings County to punish me for contempt. I was subpoenaed to appear before a Grand Jury in Kings County. This is the second such subpoena I have received from this County in the past two years. I appeared on a number of adjourned dates. I am advised and verily believe that the stated function of the Grand Jury was to investigate crimes of conspiracy to commit murder and other related crimes in Kings County as part of an alleged struggle to succeed one Joseph Bonanno as head of an organized crime syndicate in Kings County. This, I am advised and verily believe, was garnered for the first time on my behalf from the moving papers which seek to punish me for contempt. The last of my appearances before this Grand Jury was on February 5, 1970. It is as a result of the appearance on this date that the instant motion was made to punish me for contempt.

At the same time that I was subpoenaed to appear before the Kings County Grand Jury, I was also to appear before the Nassau County Grand Jury. The stated purposes of the Nassau County Grand Jury was to investigate crimes of murder in the first degree and other crimes in violation of the Penal Law of the State of New York in order to succeed one Joseph Bonanno, also known as Joe Bananas in an organized crime syndicate. I appeared before the Nassau County Grand Jury for the last time on January 16, 1970 and as a result of that appearance and my assertion of my Fifth Amendment privileges, I was adjudicated in contempt of Court and sentenced to thirty (30) days imprisonment which term I have just concluded serving.

This Motion

I respectfully request this Court to deny the instant motion to punish me for the following reasons:

At the time of my being subpoenaed before this Grand Jury I was obviously the target of this investigation. Albeit, I was offered immunity. The purpose and motive in offering me this immunity was in effect to provide a basis for the District Attorney to punish me either for contempt or for perjury when in fact he had no evidence of my committing any substantive crime. I, therefore, would request the privilege of being returned to the Grand Jury with my counsel present in the Grand Jury at the time that I am being called upon to testify in the same way that I would be entitled to have my counsel present when I am being questioned in connection with any substantive crime.

As an additional basis for the denial of this motion I submit to this Court that the sole purpose of this Grand Jury proceeding was as previously indicated, to either punish me for contempt or to see if a basis for the perjury could be established.

I have been advised and verily believe that a Grand Jury is empowered to investigate crime and to grant immunity to witnesses in furtherance of such investigation. However, the record is quite clear that the purpose of these proceedings was not to investigate crime or to afford witnesses immunity in order to further the investigation, but to establish a basis to incarcerate me. It must be apparent to all concerned that the District Attorneys of Kings County and Nassau County were aware of each others proceedings and were in constant communication concerning the progress of their respective proceedings. The identity of their respective proceedings has already been indicated in this affidavit by the reference to the stated purpose of both of their investigations and the identity of the stated purposes. Their overlapping and

identical nature will be further pointed out if indeed they they need be, by reference to the questions before the respective Grand Juries. However, the main thrust of this contention is that when I was called to testify on February 5th in Brooklyn, the District Attorney's Office in this County was already aware that I had asserted my Fifth Amendment privileges to the identical questions they asked me before the Nassau County Grand Jury. Thus, by no stretch of the imagination or under any color of right could they possibly contend that by asking me these questions in Kings County they were seeking to further the investigation. It must, therefore, become apparent that they were seeking merely to incarcerate me when I reasserted my constitutional privilege. Thus, what I am submitting to this Court is that the Grand Jury in Kings County was not acting in good faith, was not in fact conducting an investigation, but was merely seeking to subvert their power to punish me for contempt because they knew what my position was going to be. This in effect was a planned harassment and not within the power of the Grand Jury.

As a further demonstration of the lack of good faith on the part of the Grand Jury and as illustration of another basis for the denial of this motion, profitable recourse must be had to the questions actually put to me before the respective Grand Juries. For ease of reference I will set forth photostatic copies of the actual pages of the questions before the respective Grand Juries. I will refer to the questions before the Brooklyn Grand Jury by the letters of the alphabet and the identical questions before the Nassau Grand Jury by number. In Brooklyn on the February 5, 1970 appearance I was asked on Page 55, "Do you know an individual by the name of Paul Sciacca?", (see Exhibit

"A"). In Nassau County I was asked, "Do you know Paul Sciacca, also known as Paulie Shocks?", (see Exhibit "1"). In Brooklyn I was asked, "Do you know Natale Evola?", (see Exhibit "A"). In Nassau I was asked, "Do you know Natale Evola?", (see Exhibit "2"). In Brooklyn I was asked, "Do you know an individual by the name of Frank Mari?", (see Exhibit "B"). In Nassau I was asked, "Do you know Frank Mari?", (see Exhibit "3"). In Brooklyn I was asked from whom I received the loans of money, (see Exhibits "C" and "D"). In Nassau I was asked to fill out a financial questionnaire concerning my sources of money, (see Exhibit "4").

In short, the questioning was identical and the purpose is manifest. This is borne out by the paucity of the questions actually asked of me in Kings County. The few questions asked me in Brooklyn clearly indicate that information was not being sought in furtherance of an investigation, but merely a quick basis for once again adjudicating me in contempt. I submit that this course of conduct clearly spells out an attempt to subvert my Fifth Amendment privilege to punish me for contempt for asserting this privilege for indeed the Grand Jury in Kings County knew as a result of my Nassau County appearance that I was going to assert my privilege. They knew the exact questions to which I was going to assert my privilege and merely repeated them. This was done with the intention to punish me for contempt for the assertion of my constitutional right. I have been advised and verily believe that there is language from the highest Court in this State indicating that the questions that I am raising have never been determined. That in addition, there is indication from this same Court that contempt adjudication based on the same re-

fusals and evasions can be so numerous and onerous as to deny due process of the person questioned. I am told that this language is contained on Page 713 of a case called *Second Additional Grand Jury* v. *Cirillo,* which is reported in 237 N.Y.S.2d 713.

It is respectfully submitted that this motion be denied or in the alternative, a hearing be ordered to determine whether in fact this investigation in Brooklyn and this contempt proceeding is done in good faith or based on a program to harass and punish me for asserting my Fifth Amendment rights.

/s/ PHILIP RASTELLI
Philip Rastelli

Sworn to before me this
23rd day of March, 1970

GUSTAVE H. NEWMAN
Notary Public, State of New York
No. 30-2879625
Qualified in Nassau County
Commission Expires March 30, 1971

APPENDIX H

Grand Jury Proceedings, Nassau County, January 16, 1970

PHILIP RASTELLI, recalled as a witness, having been previously duly sworn by the Foreman, testified further as follows:

By Mr. Levy:

Q. Mr. Rastelli, be seated, please and state your name for the record. A. Again? I just did that before.

Mr. Levy: Mr. Foreman?

The Foreman: Please state your name. I direct you to state your name.

A. Philip Rastelli, 97-20 57th Avenue, Corona, Queens.

By Mr. Levy:

Q. All right. I remind you that you're still under oath. Do you understand that? A. I understand that.

Mr. Levy: All right. Mr. Foreman, has the Grand Jury made a determination as to whether to grant this witness immunity?

The Foreman: Yes, we have, Mr. District Attorney.

Mr. Rastelli, in view of the fact that on November 20th you had direction to obtain counsel and appear before the court and did so, we have decided to grant you full immunity, which I am going to give you now.

Mr. Rastelli, this Grand Jury confers full and complete immunity upon you from an indictment or prosecution and from subjection to penalty or forfeiture for any act or transaction, matter or thing concerning which you may give answers or produce evidence, and that no such answer given by you or evidence produced by you shall be received against you in any way in any criminal proceeding.

But in doing this we have to point out to you that the grant of immunity just conferred upon you by the Grand Jury does not prohibit you from being prosecuted or being subjected to penalty or forfeiture for any perjury or any contempt committed by you in answering or failing to answer or in producing or failing to produce evidence.

Mr. District Attorney, this Grand Jury directs you to question the witness.

By Mr. Levy:

Q. Did you understand what the Foreman told you, Mr. Rastelli? A. Yeah. Is that statewide this immunity? Does it cover the federal government, too?

Q. Under the cases that have been decided both in the federal courts as well as the state courts, the law is that your testimony here cannot be used against you to find an indictment against you by either the federal law enforcement agencies and federal grand juries, nor by state law enforcement agencies nor state grand juries with the exception that if you commit perjury before this Grand Jury, in that you lie to this Grand Jury, then that testimony can be used against you in a perjury indictment arising from your appearance before the Grand Jury, or if you willfully

refuse to answer the questions put to you by this Grand Jury you may be held in contempt of this Grand Jury and of the County Court.

Did you understand that? A. Yes.

Q. Are you prepared to testify at this time? A. Well, you ask the questions and see what I tell you.

Q. Do you know Natale Evola? A. I'm not answering no questions without my lawyer and I stand on the Fifth Amendment.

The Foreman: You're directed to answer the question.

The Witness: I respectfully refuse to answer on the grounds that it might tend to incriminate me.

By Mr. Levy:

Q. Do you know Nicholas Marangello? A. I refuse to answer on the grounds it may tend to incriminate me.

The Foreman: Mr. Rastelli, this Grand Jury directs you to answer that question.

The Witness: I'm sorry, sir, and I stand on my right that I refuse to answer on the grounds it may incriminate me.

By Mr. Levy:

Q. Mr. Rastelli, in response to the other questions that I'm going to put to you, if you're going to persist to refuse to answer, if you'll just state that you refuse to answer on the same grounds, that will be sufficient. A. Yes, all right, then.

Q. Do you know Anthony Licci, also known as Tony Licci? A. I refuse to answer on the same grounds.

The Foreman: We direct you to answer that question.

The Witness: I refuse to answer on the same grounds.

By Mr. Levy:

Q. On May 6th, 1968 did you meet with Natale Evola, Nicholas Marangello, Anthony Licci and Frank Mari at the Italian-American Veterans' Club, 43 Madison Street, Manhattan? A. I refuse to answer on the same grounds.

The Foreman: We direct you to answer the question.

The Witness: I refuse to answer on the same grounds.

By Mr. Levy:

Q. Do you know Frank Mari? A. I refuse to answer on the same grounds.

The Foreman: You're directed to answer that question, Mr. Rastelli.

The Witness: I refuse to answer on the same grounds.

By Mr. Levy:

Q. Do you know Mike Adamo? A. I refuse to answer on the same grounds.

The Foreman: You're again directed to answer the question.

The Witness: I refuse to answer on the same grounds.

By Mr. Levy:

Q. Do you know Jane Mari? A. I refuse to answer on the same grounds.

The Foreman: We direct you to answer that question.

The Witness: I refuse to answer on the same grounds.

By Mr. Levy:

Q. Do you know Grace Adamo? A. I refuse to answer on the same grounds.

The Foreman: This Grand Jury directs you to answer the question.

The Witness: I refuse to answer on the same grounds.

By Mr. Levy:

Q. Do you know James Escopia? A. I refuse to answer on the same grounds.

The Foreman: You're directed to answer the question, sir.

The Witness: I refuse to answer on the same grounds.

By Mr. Levy:

Q. Do you know James Episcopia, also known as Jimmy Legs? A. I refuse to answer on the same grounds.

The Foreman: We direct you to answer the question.

The Witness: I refuse to answer on the same grounds.

By Mr. Levy:

Q. Do you know Chickie Escopia? A. I refuse to answer on the same grounds.

The Foreman: You're directed to answer the question.

The Witness: I refuse to answer on the same grounds.

By Mr. Levy:

Q. When was the last time that you saw Grace Adamo? A. I refuse to answer on the same grounds.

The Foreman: You're directed to answer that question, sir.

The Witness: I refuse to answer on the same grounds. Of course, I refuse respectfully, I want you to know that, sir.

By Mr. Levy:

Q. When was the last time that you saw James Episcopia, also known as Jimmy Legs? A. I refuse to answer on the same grounds.

The Foreman: You're again directed to answer the question, sir.

The Witness: I refuse to answer on the same grounds.

By Mr. Levy:

Q. When was the last time that you saw Frank Mari? A. I refuse to answer on the same grounds.

The Foreman: We again direct you to answer the question.

The Witness: I refuse to answer on the same grounds.

By Mr. Levy:

Q. When was the last time you saw Michael Adamo? A. I refuse to answer on the same grounds.

The Foreman: You're directed to answer that question, sir.

The Witness: I refuse to answer on the same grounds.

By Mr. Levy:

Q. When was the last time that you saw Joe Mari? A. I refuse to answer on the same grounds.

The Foreman: You're directed to answer the question.

The Witness: I refuse to answer on the same grounds.

By Mr. Levy:

Q. Did you know Sam Perrone, also known as Hank Perrone? A. I refuse to answer on the same grounds.

The Foreman: The Grand Jury directs you to answer that question.

The Witness: I refuse to answer on the same grounds.

By Mr. Levy:

Q. Have you ever heard of a criminal organization and syndicate commonly known as the Cosa Nostra? A. Refuse to answer on the same grounds.

The Foreman: You're directed to answer the question.

The Witness: I refuse to answer on the same grounds.

By Mr. Levy:

Q. Have you ever been a member of a criminal organization and syndicate commonly known as the Cosa Nostra? A. I refuse to answer on the same grounds.

The Foreman: Grand Jury directs you to answer that question.

The Witness: I refuse to answer on the same grounds.

By Mr. Levy:

Q. On May 6th, 1968 in the presence of Natale Evola, Nicholas Marangello, Anthony Licci and Frank Mari at the Italian-American Veterans' Club, 43 Madison Street, Manhattan, did you talk about the sale and importation of narcotics? A. I refuse to answer on the same grounds.

The Foreman: You're directed to answer the question, sir.

The Witness: I refuse to answer on the same grounds.

By Mr. Levy:

Q. Do you know Paul Sciacca, also known as Paulie Shocks? A. I refuse to answer on the same grounds.

The Foreman: You're directed to answer that question.

The Witness: I refuse to answer on the same grounds.

By Mr. Levy:

Q. Do you know Gaspar DeGregorio? A. I refuse to answer on the same grounds.

The Foreman: We direct you to answer that question.

The Witness: I refuse to answer on the same grounds.

By Mr. Levy:

Q. Do you know Joseph DeFilippi? A. I refuse to answer on the same grounds.

The Foreman: You're directed to answer that question, sir.

The Witness: I refuse to answer on the same grounds.

By Mr. Levy:

Q. Have you ever been to Montreal, Canada? A. I refuse to answer on the same grounds.

The Foreman: You're directed to answer the question.

The Witness: I refuse to answer on the same grounds.

By Mr. Levy:

Q. When was the last time that you were in Montreal, Canada? A. I refuse to answer on the same grounds.

The Foreman: We again direct you to answer the question.

The Witness: I refuse to answer on the same grounds.

The Foreman: Mr. Rastelli, you've been advised of the scope of this Grand Jury investigation and have been conferred with full and complete immunity by this Grand Jury. The Grand Jury finds it necessary and material to direct that you be served with a subpoena duces tecum requiring you to produce certain books, records and papers relating to your income, finances and sources of income.

The purpose of requiring production of these books, records and papers and eliciting testimony and a financial questionnaire from you in connection with your income, finances and sources of income, is to ascertain whether any of your income has, in fact, been derived from, and is a result of the criminal activities this Grand Jury is investigating and for which you have been conferred with full and complete immunity.

Mr. District Attorney, the Grand Jury directs you to serve the witness with the subpoena duces tecum and the financial questionnaire.

Mr. Levy: May the record reflect that the witness was served with a subpoena duces tecum for the production of certain financial records listed in the subpoena, returnable February 6th, 1970.

I offer the original in evidence.

(Document referred to received in evidence and marked Grand Jury Exhibit 111.)

Mr. Levy: May the record reflect that a copy of Grand Jury Exhibit 103 was delivered to the witness.

The Foreman: Mr. Rastelli, the Grand Jury further directs you to prepare that financial statement and deliver it to the Grand Jury on February 6th, 1970.

In addition, since you've not obtained counsel since November 20th, we are further directing you to appear before the court in this building, January 22nd, with counsel.

Mr. District Attorney, in the event Mr. Rastelli does not have counsel at that time we respectfully request that the court appoint counsel for Mr. Rastelli.

Mr. Levy: The wishes of the Grand Jury will be conveyed to Judge Kelly, Mr. Foreman.

The Foreman: Mr. District Attorney, we are further directing that Mr. Rastelli be served with a subpoena to reappear before this Jury on Friday, the 23rd of January at 9:30 A.M.

Mr. Levy: May the record reflect that the witness was served with a subpoena directing his appearance before the Grand Jury on Friday, January 23rd, 1970 at 9:30 A.M.

Is the witness excused now, Mr. Foreman?

The Foreman: Mr. Rastelli is excused.

Mr. Levy: Do you understand one thing, Mr. Rastelli, that you're due down before Judge Kelly next Thursday morning, January 22nd, at 9:30 in the morning.

You understand that, sir?

The Witness: I understand.

APPENDIX I

Grand Jury Proceedings, Kings County, February 5, 1970

PHILIP RASTELLI, residing at 9720 57th Avenue, Corona, New York, having been called as a witness, having been duly sworn, testified as follows:

By Mr. Katz:

Q. You previously testified before this Grand Jury, is that correct, sir? A. Yes, sir.

Q. In relation to certain questions you refused to answer, the District Attorney has given you a week's time to think over whether you would like to answer those questions or not. We believe you also wanted an adjournment to obtain counsel. Have you obtained counsel? A. Yes. Mr. Newman.

Q. Of 186 Joralemon Street? A. Yes.

Q. Mr. Rastelli, you have been informed of the purpose of this investigation, which is into the alleged take over of a crime syndicate in the County of Kings and other related crimes, such as bookmaking and trafficking in narcotics and infiltrating legitimate business. Also this Grand Jury believes you may have information which may aid us in our investigation. I am going to inform you of your rights. You have the Fifth Amendment privilege against self incrimination. You also have a right to have an attorney present outside the Grand Jury room and this Grand Jury has the right to grant you immunity, which I believe, they have done on a previous occasion. This means that any question that you answer, which in answering, you

admit to a crime, you cannot be convicted of that crime if your answer was relevant to this question. You have received Transactional Immunity under Section 619C & D. I am going to ask you a series of questions. Do you know an individual by the name of Carlo Gambino? A. I refuse to answer on the ground that it may tend to incriminate me.

Q. In other words, the Fifth, Sixth and Fourteenth Amendment? A. Yes. I do this with respect to the Grand Jury and District Attorney.

Q. Do you know an individual by the name of Paul Sciaeca? A. I refuse to answer.

Q. Natale Evola? A. I refuse to answer on the same grounds.

Q. On your previous appearance before this Grand Jury, you testified that you were unemployed. You have no source of income and that you receive loans in order pay your rent, buy your clothes, etc., and I had asked you from whom did you receive these loans of money and you refused to answer that question. I am again going to ask that question. From whom did you receive loans of money? A. I refuse to answer. I have a lien pending with the government.

Mr. Katz: At this time I am going to ask you to be excused from the Grand Jury. I am going to ask the Grand Jury to vote on granting you immunity and then I will ask you some more questions and, if you refuse to answer, the District Attorney will take further legal action if he deems it necessary. Please wait outside.

[Witness leaves room]

Mr. Katz: I respectfully request the members of the Grand Jury to consider the granting of immunity to this witness.

[At this time the Assistant District Attorney and the Grand Jury stenographer, leave the Grand Jury room.]

[At this time the Assistant District Attorney and the Grand Jury stenographer return to the Grand Jury room.]

Mr. Katz: Mr. Foreman, has the Grand Jury considered the granting of immunity to this witness?

The Foreman: This Grand Jury has granted immunity to the witness.

Mr. Katz: How was the vote, sir?

The Foreman: Unanimous.

By Mr. Katz:

Q. Mr. Rastelli, this Grand Jury has granted you immunity under the Code of Criminal Procedure of the State of New York, Section 619 C & D, which means that if your answers to the questions are relevant and you admit to a crime, you can never be prosecuted for that crime in the State of New York. Do you understand that? A. Yes.

Q. Mr. Rastelli, you have previously told us that you have received loans of money to pay your expenses. From whom did you receive the loans of money? A. I refuse to answer on the ground that it may tend to incriminate me.

Q. Do you know an individual by the name of Carlo Gambino? A. I refuse to answer on the same grounds.

Q. Do you know Paul Sciacca? A. I refuse to answer on the same ground.

Q. Jimmy Failla also known as Jimmy Brown? A. I refuse to answer on the same ground.

Q. Do you know Philip Rastelli? A. That's me.

Q. I would like to inform you that answering to your own name cannot incriminate you and it has been decided in court and makes common sense. If I continue asking you questions about your finances or other individuals, would you continue to refuse to answer the questions even though you have been granted immunity? A. I respectfully refuse to answer on the same grounds.

Mr. Katz: I am informing you at this time that since you have been granted immunity, if you refuse to answer, there are two crimes that you may be subjecting yourself to; criminal contempt for perjury, and the only way you can perjure yourself is if you answer questions, which you are not, and leaves contempt. If you refuse to answer and do not cooperate with the Grand Jury, after being granted immunity, you may be subjecting yourself to prosecution for contempt under the judicial law of the State of New York, Section 750, which means a possibility of 30 days in jail or a fine of $250 or a combination of both. This is civil contempt. Also, under the penal law of the State of New York, Section 215.50, that is criminal contempt, you may be eligible to receive a sentence if indicted by the Grand Jury of up to one year in jail or a fine of $500 or a combination of a fine and sentence, depending on what the judge in the case will do. I am informing you of the possible penalties involved for refusing to answer questions before a Grand Jury. Do you

By Mr. Katz:

Q. Do you know an individual by the name Carlo Gambino? A. I refuse to answer on the same grounds.

Q. Do you know an individual by the name of Paul Sciacca? A. I respectfully refuse to answer on the same ground.

Q. Do you know an individual by the name of Joseph Columbo? A. I refuse to answer on the same ground.

Q. Do you know an individual by the name of Frank Mari? A. I refuse to answer on the same ground.

Q. Do you know an individual by the name of James Failla? A. I refuse to answer on the same ground.

Mr. Katz: Mr. Rastelli, at this time I am going to excuse you from this Grand Jury and resubpoena you for February 24, 1970. In the meantime, you will have an opportunity to consider whether you would like to answer the questions and consult with your attorney. You are excused.

[Witness excused]

[IN PART]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 594

PHILIP RASTELLI,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1970

No. 594

PHILIP RASTELLI,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a writ of certiorari in order to review an order of the Appellate Division of the Supreme Court of the State of New York, Second Department, dated June 15, 1970, which affirmed an order of the Supreme Court of Kings County, Criminal Term, Part I, dated April 30, 1970, adjudging petitioner in Contempt of Court under Section 750 of the Judiciary Law of the State of New York.

Jurisdiction

The jurisdiction of this Court is sought to be invoked under 28 U.S.C. Section 1257 (3) and Rule 19 subdivision I of the rules of this Court.

Statutes

Section 750 Judiciary Law of the State of New York provides:

POWER OF COURTS TO PUNISH FOR CRIMINAL CONTEMPTS

"A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.

3. Wilful disobedience to its lawful mandate.

4. Resistance wilfully offered to its lawful mandate.

5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory.

6. Publication of a false, or grossly inaccurate report of its proceedings. But a court cannot punish as a contempt, the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein.

7. Wilful failure to obey any mandate, process or notice issued pursuant to articles sixteen, seventeen, eighteen, eighteen-a or eighteen-b of the Judiciary Law, or to rules adopted pursuant thereto, or to any other statute relating thereto, or refusal to be sworn as provided therein, or subjection of an employee to discharge or pen-

> alty on account of his absence from employment by reason of jury service in violation of this chapter. Applications to punish the accused for a contempt specified in this subdivision may be made by notice of motion or by order to show cause, and shall be made returnable at the term of the Supreme Court at which contested motions are heard, or of the county court if the Supreme Court is not in session."

Section 619-c of the New York State Code of Criminal Procedure provides for the granting of immunity as follows:

> ". . . 2. 'Immunity' as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt."

Statement of the Facts

The petitioner Rastelli had been subpoenaed before a Kings County Grand Jury, the last of which such appearances was on February 5, 1970. He was asked certain questions and he asserted his Fifth Amendment privilege.

Thereupon in the manner prescribed by law, the petitioner was granted full and complete statutory immunity pursuant to statute. Despite said grant of statutory immunity, the petitioner persisted in his refusal to answer any and all questions. As a result thereof he was served with an order to shown cause to punish him for contempt. The petitioner appeared before Mr. Justice Helfand and was held in contempt on April 30, 1970, after refusing in open court to return to the Grand Jury and answer proper and lawful interrogatories propounded to him. The petitioner was sentenced to 30 days in the Civil Jail and to pay a fine of $250.

The said order was affirmed by the Appellate Division, Second Department, on June 15, 1970.

The Court of Appeals of the State of New York denied leave to appeal to that Court on July 6, 1970. The said Court also denied a stay of proceedings pending an application for certiorari to this Court.

The petitioner was indicted for criminal contempt. He was charged with violation of Section 215.50, subdivision 4 of the Penal Law of the State of New York on June 11, 1970.

An application for a further stay of the commitment order was made to the Hon. John M. Harlan, an Associate Justice of this Court, on July 29, 1970. A stay was granted pending the filing of papers by the petitioner by August 26, 1970.

ARGUMENT

POINT I.

It was not a violation of due process of law and petitioner's Fifth Amendment privilege to punish him for contempt in refusing to answer before a Kings County Grand Jury some of the same questions which he had already refused to answer before a Nassau County Grand Jury and for which he had already been punished by a jail sentence by reason of such refusal.

The petitioner contends that the investigations in Kings County and Nassau County are basically the same investigation. This contention is not correct. The investigation in Nassau County deals with the disappearance of Frank Mari and Michael Adamo. The investigation in Kings County by the Grand Jury is into the takeover of a Crime Syndicate in the County of Kings formerly headed by Joseph Bonanno and multiple homicides and assaults in the County of Kings that led to the takeover of this Crime Syndicate. Frank Mari based upon information supplied to the District Attorney of Kings County was a leading contender to succeed Joseph Bonanno. As one can see the investigations are not one and the same, but overlap in one small area. It is the duty of the District Attorney of Kings County and the Grand Jury to determine who the perpetrators of these murders and assaults in Kings County are, and it is believed that the petitioner could further aid the Grand Jury investigation. Through information supplied to the Kings County District Attorney by reliable police sources Rastelli's name was given to us along with certain information stating that the petitioner may be able to furnish testimony concerning the perpetrators of these crimes in the County of Kings.

It is quite possible that the Kings County investigation may overlap to some extent the Nassau County investigation; however, both investigations basically deal with a different subject matter and the Kings County investigation is much broader in scope and does not deal only with the disappearance of two men as the Nassau County investigation does.

Mr. Rastelli's rights have been protected by his counsel and the District Attorney of Kings County. The District Attorney of Kings County is conducting its own independent investigation in good faith. The bona fide nature of the Kings County investigation has already been ruled upon by the courts and affirmed by the Appellate Courts in other contempt cases—*Menna* v. *Gold*, 25 N Y 2d 475 (1969).

The case of *Matter of Koota* v. *Colombo*, 17 N Y 2d 147, allows the District Attorney to indict the witness for contempt under the Penal Law of New York, and/or initiate proceedings under the Judiciary Law of New York to hold the witness in contempt. This case allows the District Attorney to use both methods if he so desires. See also *Matter of Ushkowitz* v. *Helfand*, 15 N Y 2d 713. The petitioner claims that his rights under the Fifth Amendment of the United States Constitution are being violated since he was indicted under the Penal Law of the State of New York Section 215.50, subdivision 4, and adjudicated in contempt under the Judiciary Law of the State of New York, Section 750. This is not so. The petitioner was indicted for not answering questions under Section 215.50 of the Penal Law of the State of New York, and the petitioner was held in contempt under Section 750 of the Judiciary Law of the State of New York for disobeying the lawful mandate of Justice Helfand who ordered him back to the Grand Jury to answer the questions propounded to him. The petitioner

has committed two separate acts, one is refusing to obey the lawful mandate of the Court so Mr. Justice Helfand held him in contempt under the Judiciary Law of the State of New York. The second act was the petitioner's refusal to answer questions before a Grand Jury. The petitioner was indicted for refusing to answer the questions propounded to him. Since the petitioner has committed two separate acts he is not placed in a position of twice being in jeopardy for the same crime. His refusal to obey the Courts direction and his refusal to answer questions are independent acts of each other and do not give rise to double jeopardy. The petitioner has not indicated that he wishes to purge himself; therefore, he has no standing to raise the issue that he would in effect be pleading guilty to an indictment. At present there is no issue to be litigated since the petitioner is not in a position to possibly do harm to himself legally.

The immunity statute in New York Section 619-c of the Code of Criminal Procedure is more than co-extensive with the petitioner's privilege against self-incrimination. This petitioner receives transactional immunity—*Menna* v. *Gold*, 25 N Y 2d 475 (1969).

POINT II

It was not a deprivation of petitioner's constitutional right to the assistance of counsel to refuse petitioner's request to have his counsel physically present with him in the Grand Jury room during his interrogation by the Grand Jury.

The law always has been that a witness before a Grand Jury or other similar investigative body, does not have the right to have an attorney actually in the room, *Anonymous* v. *Baker*, 360 U.S. 287, 292 (1959); *Matter of Groban*, 352 U.S. 330, 333 (1957); *United States* v. *Scully*, 225 F. 2d 113, 115-116 (2nd Cir. 1955) cert. den. 350 U.S. 897; *Matter of Black*, 47 F. 2d 542, 543 (2nd Cir. 1931); *Battaglia* v. *United States*, 349 F. 2d 556, 560 (9th Cir. 1965); *People* v. *Ianniello*, 21 N Y 2d 418, 423, although the right to consult with his attorney who may be outside the chamber is really not in serious dispute. *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478, 486 (1964); *United States* v. *Leighton*, 265 F. Supp. 27, 38 (S.D.N.Y. 1967); *United States* v. *Kane*, 243 F. Supp. 746 (S.D.N.Y. 1965); *United States* v. *Grunewald*, 164 F. Supp. 640 (S.D. N.Y. 1958); *People* v. *Ianniello*, 21 N.Y 2d 418, 423; *People* v. *DeFeo*, 284 App. Div. 622, 627, rev'd on other grounds, 308 N.Y. 595 (1954).

Even Mr. Justice Black who dissented in *In re Groban*, *supra*, in an opinion joined in by Chief Justice Warren and Justices Douglas and Brennan, indicated that he would have joined the majority had the case involved the traditional 12 to 23 member Grand Jury, where there was less danger of abuse than in the situation actually before the Court, one of a single inquisitor.

Mr. Justice Black said that the need for counsel in the room was not as great where grand jurors were concerned:

> "They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. Similarly, the presence of the jurors offers a substantial safeguard against the officers' misrepresentation, unintentional or otherwise, of the witness' statements and conduct before the grand jury. The witness can call on the grand jurors if need be for their normally unbiased testimony as to what occurred before them."

In re Groban, supra at 347.

It would seem that the wisdom of these rules is still valid because if counsel were permitted in the Grand Jury room itself, constant objections to questions on the ground of relevancy, form or other privilege and constant requests for rulings from the Court sitting would unduly lengthen the Grand Jury's proceedings. There could be a serious roadblock to legitimate inquiry implanted by stalling or delaying tactics and since a Grand Jury never ultimately determines innocence or guilt and the sufficiency of its indictments are usually open to judicial scrutiny anyway, no harm is inherent in adhering to the prevailing rules.

The secrecy of the Grand Jury's proceedings could be seriously impaired because oftentimes the same attorney represents more than one witness during a particular in-

vestigation. The proceedings would essentially be changed in character from proceedings basically investigatory in nature to an adversary situation. This would pervert the historical purpose of the Grand Jury as a finder of fact and turn its proceedings into a pre-trial hearing. That sentiment was expressed in *Stallings* v. *State*, 154 Conn. 272 (1966), where it was thought that allowing counsel into the room would turn the Grand Jury's proceedings into nothing more than a preliminary trial and the dangers were forcefully and clearly noted by Chief Judge Fee in *United States* v. *Smythe*, 104 F. Supp. 283, 290-291 (N.D. Cal. 1952) and by District Judge Kirkpatrick in *In re Grand Jury Proceedings*, 4 F. Supp. 283, 284 (E.D. Pa. 1933).

Petitioner argues that the rationale of recent decisions of this Court in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961); *Miranda* v. *Arizona*, supra; *United States* v. *Wade*, 388 U.S. 218 (1967) and *Coleman* v. *Alabama*, U.S. , 38 U.S.L.W. 4534 (Decided June 22, 1970) required the extension of the right to counsel to the Grand Jury Room.

Analysis of those authorities reveals that their holdings do not affect the long standing practice of excluding the attorney from the room itself. All of the Courts that have considered the problem have concluded that because the Grand Jury does not involve a situation where oppressive custodial interrogation in a police dominated atmosphere is present, the right to counsel should not be further extended to that situation. *United States* v. *DiMichele*, 375 F. 2d 959 (3rd Cir. 1967); *United States* v. *Goldenberg*, 276 F. Supp. 898, 900 (S.D.N.Y. 1967); *United States* v. *Wolfson*, 282 F. Supp. 772 (S.D.N.Y. 1967); *State* v. *Nelson*, 202 So. 2d 232 (Fla. 1968).

Judge Tenney pointed out in *United States* v. *Goldenberg*, *supra* at 909 that:

> "Neither *Escobedo* or *Miranda* is authority for the proposition that a witness before a Grand Jury is entitled to have counsel physically present with him in the Grand Jury room".

This Court also recognized in *Miranda* itself that the factors present in the police station were different than would attend other types of less overbearing inquiry.

> "As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other *official investigations*, where there are impartial observers to guard against intimidation or trickery". (Emphasis added) *Miranda* v. *Arizona*, *supra* at 461.

Contrary to the Alabama preliminary hearing in the *Coleman* case, Grand Jury proceedings are not a "critical Stage" of the prosecution because potential substantial prejudice to a defendant's rights does not exist. Grand Jury proceedings are not a confrontation, *Costello* v. *United States*, 350 U.S. 463 (1956); *United States* v. *Smythe*, *supra*, and since they only determine whether a man should be made to answer criminal charges, the prosecutor's case against him does not in any way benefit from what occurs in the Grand Jury. The proceeding only examines evidence already secured and does not result in the addition of anything new or the waiver or relinquishment of any rights or course of action otherwise available to a witness or defendant.

This Court has held that even if error of constitutional magnitude is present, if no harm results, the error can be disregarded. *Chapman* v. *California*, 386 U.S. 18 (1967).

In a recent case, *Coleman v. Alabama*, U.S. , 38 U.S.L.W. 4535 (decided June 22, 1970), where the petitioner had been deprived of his right to counsel at a preliminary hearing, this Court decided that although it was a critical stage of the proceedings, still, a remand was appropriate to determine if there had been any prejudice. The law of Alabama prevented the use of anything said at the hearing without counsel and if no harm was apparent, the judgment would not have to be disturbed. *Chapman* was reaffirmed.

CONCLUSION

The petition for the writ of Certiorari should be denied.

Dated: Brooklyn, New York
October 23, 1970.

Respectfully submitted,

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